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No. 82-1511

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF CALIFORNIA, *et al.*,

Cross-Petitioners,

vs.

JAMES G. WATT, *et al.*,

Cross-Respondents.

BRIEF FOR THE CROSS-PETITIONERS.

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Question Presented.

Whether the Ninth Circuit erred in addressing the meaning of the phrase "to the maximum extent practicable," as used in § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when the statutory language had not yet been applied by the Department of the Interior in the context of this case, when there was no administrative or factual record, and when no issue regarding the meaning of this phrase has been raised, briefed or argued in the courts below.

Parties to the Proceeding.

This litigation was commenced by the filing of separate complaints by the State of California and several environmental groups. Parties plaintiff included the State of California (acting by and through the Governor, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation), the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. A number of California cities and counties intervened as parties plaintiff in the litigation brought by the State: the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma, and the Cities of Brisbane, Capitola, Carmel-by-the Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside, as well as the Association of the Monterey Bay Area Governments.

Named as defendants, in addition to the Secretary of the Interior, were the United States Department of the Interior, the United States Bureau of Land Management, Edward Hastey (then Acting Director of the United States Bureau of Land Management) and Robert Burford (then Director Designate and now Director of the United States Bureau of Land Management). The Western Oil and Gas Association intervened as a party defendant in the litigation, as did Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Exxon Corp., Elf Aquitaine Oil & Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Amicus briefs were filed in the Ninth Circuit on behalf of the Coastal States Organization and the States of Alaska, Florida, Maine, Massachusetts, North Carolina, and Oregon.

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BRIEF FOR THE CROSS-PETITIONERS.

Opinions and Judgments Below.

The Opinion of the Court of Appeals, DOI Pet. at 1a-33a, is reported at 683 F.2d 1253 (9th Cir. 1982).[1] The judgment of the Court of Appeals was entered August 12, 1982. DOI Pet. at 82a. The opinion of the District Court, DOI Pet. at 34a-78a, is reported at 520 F. Supp. 1359 (C.D. Cal. 1981). The judgment of the District Court was entered August 18, 1981. DOI Pet. at 79a-81a.

Jurisdiction.

After entry of the judgment in the Court of Appeals, a timely petition for rehearing was denied on November 10, 1982. DOI Pet. at 82a-83a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] *See* note 2, *infra*, for form of citation in this brief to the opinions below.

Statutes Involved.

Section 307(c) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c), is reproduced in Appendix E of the Petition for a Writ of Certiorari of the Secretary of the Interior at 84a-86a.

Statement of the Case.

This Court granted the petitions for writ of certiorari to review the decisions of the courts below that the Department of the Interior's (DOI's) proposed oil and gas lease sale on the Outer Continental Shelf (OCS) off central California, Lease Sale 53, is a federal activity "directly affecting" California's coastal zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1456(c)(1).[2] DOI steadfastly maintained in both the District Court and the Court of Appeals for the Ninth Circuit that the proposed lease sale did not "directly affect" the coastal zone, and DOI refused to comply with the consistency requirements of § 307(c)(1).[3] Thus, the only CZMA issue before the courts below was the threshold question of whether the lease sale was subject to those requirements. Only if the decisions below are upheld, and DOI complies with the consistency provisions of § 307(c)(1), would the requirement that the lease sale be "to the maximum extent

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[2]For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Petition for a Writ of Certiorari of the Secretary of the Interior, *et al.*, are cited as "DOI Pet. at ...." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at ....a." References to the petition of the Western Oil and Gas Association, *et al.*, are cited as "WOGA Pet. at ...." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23." Documents from the Joint Appendix are similarly cited, with the abbreviation "J.A." replacing "C.R."

[3]The statutory language is set out in full at note 6, *infra*.

practicable" consistent with California's federally approved Coastal Management Program be called into play.

Nonetheless, in its opinion, the Ninth Circuit, *sua sponte*, discussed the general contours of compliance with the requirement that federal activities directly affecting the coastal zone be consistent "to the maximum extent practicable" with a state's coastal management program. DOI Pet. at 19a-23a. Cross-petitioners therefore present the question here of whether the meaning of the phrase "to the maximum extent practicable," as used in § 307(c)(1), is ripe and otherwise justiciable in the context of the instant dispute concerning the threshold applicability of § 307(c)(1) to DOI's proposed lease sale.

In order to appreciate the import of the requirement that federal activities directly affecting a state's coastal zone be consistent "to the maximum extent practicable" with that state's coastal management program, it is necessary to examine the congressionally-authorized coastal management scheme of which this requirement is a part. Under the provisions of § 306 of the CZMA, 16 U.S.C. § 1455, states are encouraged to prepare coastal management programs and submit such programs to the Secretary of Commerce for federal approval. Through these programs, coastal states are to provide for comprehensive management of their coastal zones, making provision for protection of important resources and for sound and orderly development along their coasts. Congress' aim in enacting the CZMA was to protect the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). Congress found that development of the nation's coastal zone, including "extraction of . . . fossil fuels," was causing the loss of biological resources, open space, and the fragile shoreline itself. 16 U.S.C. § 1451(c), (d), (e).

Congress thus perceived a need to resolve the serious conflicts among important, competing uses of coastal resources and chose comprehensive state coastal management programs meeting the criteria of the Act as the proper vehicle to resolve these conflicts:

> "The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone. . . ."

16 U.S.C. § 1451(i). To promote the creation of state programs and to ensure the comprehensive coastal management authority of the participant states, Congress provided that, once a state management program is approved by the Secretary of Commerce, all federal agencies must conduct their activities directly affecting the state's coastal zone in a manner that is, *to the maximum extent practicable, consistent* with the state's approved program. CZMA § 307(c)(1), 16 U.S.C. § 1456(c)(1).

In November, 1977, the Secretary of Commerce approved the California Coastal Management Program (CCMP). In so doing, he found that "the views of Federal agencies principally affected" by the program had been adequately considered. Approval of the California Coastal Management Program at 26 (Nov. 7, 1977) (citing 16 U.S.C. § 1456(b)). He further found that:

> The management program provides for "adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature."

Id. at 18 (quoting 16 U.S.C. § 1455(c)(8)).

The American Petroleum Institute and the Western Oil and Gas Association (WOGA) sued to block approval of

the CCMP. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). These oil industry groups brought their challenge out of a purported concern that California would use its consistency powers under the CCMP to preclude oil and gas activities along the coast. 456 F. Supp. at 922. They attacked the CCMP for its alleged failure to consider adequately the views of affected federal agencies and the national interest involved in planning for and siting energy facilities. 456 F. Supp. at 920-922. However, the district court and the Ninth Circuit both rejected these claims, finding that the Program did provide for adequate consideration of the national interest and of affected federal agencies' views. 456 F. Supp. at 922-927; 609 F.2d at 1313-1315.

Since the approval of the CCMP, California has maintained that DOI's adjacent OCS lease sales are federal activities directly affecting the state's coastal zone for which consistency determinations must be performed.[4] DOI, on the other hand, has asserted the contrary. Thus, in the final stages of preparation for Lease Sale 53, DOI issued a negative determination, stating that none of its activities up to and including the lease sale would directly affect the California coastal zone. Letter from Secretary Andrus to Michael Fischer, Executive Director, California Coastal Commission (Oct. 22, 1980), J.A. 66, Cal. Exh. L-12 at 1. DOI's refusal to conduct a consistency determination set the stage for the

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[4]The National Oceanic and Atmospheric Administration (NOAA), the Department of Commerce agency charged with administration of the CZMA, has promulgated regulations to ensure that the consistency requirements of § 307(c)(1) are carried out. 15 C.F.R. §§ 930.30-.44. The mechanism through which a federal agency must attest that its proposed activity will be consistent to the maximum extent practicable with the state's management program is termed a "consistency determination." 15 C.F.R. §§ 930.34, 930.37, 930.39. If a federal agency determines that its activity does not "directly affect" the coastal zone, it issues a "negative determination." *See* 15 C.F.R. § 930.35(d).

instant suit, because California objected to the leasing of certain offshore tracts in light of DOI's refusal even to attempt to comply with § 307(c)(1).

Thus, because DOI issued a negative determination, it never engaged in the formal process specifically promulgated by NOAA to ensure that federal agency activities directly affecting the coastal zone be consistent with state management programs to the maximum extent practicable. NOAA's detailed administrative process, described *infra* at 13-14, is intended to aid federal agencies and states in resolving disputes over the consistency of such federal activities with the state programs. 15 C.F.R. §§ 930.30-.44. Because DOI did not pursue this administrative route to ensure consistency for Lease Sale 53, never having conceded that it needed to perform a consistency determination, the meaning of the phrase "to the maximum extent practicable" was not an issue raised in or addressed by the District Court. Nor was the issue briefed or argued before the Ninth Circuit in DOI's appeal of the District Court's decision on the meaning of "directly affecting."

Nonetheless, the Court of Appeals discussed the meaning of the phrase "to the maximum extent practicable" as used in § 307(c)(1) in Part IV.E. of its opinion. DOI Pet. at 19a-23a. In particular, the Ninth Circuit suggested that this phrase indicates that a state's coastal program does not take "precedence when it would preclude the federal activity" and that the federal activity need not be as consistent as "possible" with the terms of that program. *Id.* at 19a. The Ninth Circuit also impliedly suggested that DOI has discretion to avoid consistency with the state's management program on the basis that the OCS activity "would be hampered or proscribed" by such consistency, or apparently on the basis of "the reasonableness of the state plan." *Id.* at 22a.

Timely petitions for rehearing on this portion of the Court of Appeals' opinion by the State of California, *et al.*, were denied November 10, 1982. DOI Pet. at 83a.

Summary of Argument.

The only issue properly ripe for adjudication, here and in the courts below, is whether Lease Sale 53 "directly affects" the California coastal zone within the meaning of § 307(c)(1) of the CZMA, (16 U.S.C. § 1456(c)(1)), and must accordingly be the subject of a consistency determination as required by NOAA's regulations implementing that section.[5] Only if this Court affirms the Ninth Circuit's ruling on the "directly affecting" threshold test of § 307(c)(1) will these consistency requirements be invoked.

The "maximum extent practicable" standard of § 307(c)(1) applies *only after* the "directly affecting" threshold test has been met, when a consistency determination is issued. Since DOI disputed the threshold application of § 307(c)(1), there cannot be (and has not been) a controversy over the application of this substantive standard as part of a consistency process that has never occurred. Thus while the Ninth Circuit properly addressed and affirmed the trial court's ruling that Lease Sale 53 directly affects the coastal zone and that DOI must perform a consistency determination, it erred in making gratuitous, hypothetical observations about how the "maximum extent practicable" standard should apply at some point in the future.

Indeed, as the Ninth Circuit itself acknowledged, there may never be any disagreement over whether consistency "to the maximum extent practicable" will be achieved in the consistency determination that it held DOI is required

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[5]NOAA's regulations addressing the "consistency determination" requirement are discussed in note 4, *supra*.

to perform. DOI Pet. at 23a. The hypothetical possibility of a future disagreement over this phrase does not give rise to an issue that is presently ripe for adjudication.

Moreover, the meaning of this requirement cannot be properly adjudicated in advance of its application and in the absence of a factual record developed in administrative proceedings thereon. NOAA has established procedures designed to ensure that any particular issues in dispute in the application of this requirement are pinpointed and factually developed, and that they are subjected to administrative review by the federal agency proposing to conduct the activity, the state whose coastal zone will be directly affected, and ultimately the Department of Commerce, if mediation of any outstanding dispute is sought. To attempt to set abstract parameters for this requirement in advance of this administrative application not only deprives the court of the factual material it needs to illuminate the meaning of the requirement in an actual controversy, but also intrudes upon a comprehensive scheme designed by Congress to promote cooperation between the federal agency and state involved.

The Ninth Circuit's observations on the meaning of "maximum extent practicable" illustrate the unwisdom of judicial efforts to discuss this matter in the absence of a ripe controversy. Lacking any briefing or factual record for its foray into this area, its opinion reflects no awareness that NOAA had promulgated regulations dealing with the very subject addressed, and that its observations departed considerably from the standard for "maximum extent practicable" set forth in those regulations, as well as the intent of Congress reflected in the legislative history of the CZMA. The Ninth Circuit also improperly suggested general parameters for the meaning of this statutory requirement, which would apply to all federal agencies, based in part on its reading of a statute that governs only the activities of DOI.

Had it awaited a concrete controversy, it would have been able to adjudicate this matter in a focused and informed manner. As it stands, the dicta in the Ninth Circuit's opinion addressing the meaning of "maximum extent practicable" should be disapproved by this Court.

ARGUMENT.

THE ISSUE OF THE PROPER DEFINITION OF THE REQUIREMENT OF FEDERAL CONSISTENCY "TO THE MAXIMUM EXTENT PRACTICABLE" UNDER § 307(c) OF THE COASTAL ZONE MANAGEMENT ACT IS NEITHER RIPE FOR ADJUDICATION NOR OTHERWISE JUSTICIABLE.

The Ninth Circuit properly affirmed the District Court's holding that Lease Sale 53 met the threshold test of § 307(c)(1) of the CZMA, as a federal activity "directly affecting" California's coastal zone, and thus should be subjected to the consistency requirements of that provision.[6] However, in Part IV.E. of its opinion, the court went on to discuss the degree of consistency with California's coastal management program that would be exacted by the standard of § 307(c)(1) that federal activities directly affecting the coastal zone must be consistent "to the maximum extent practicable" with such programs and further discussed how such determinations might be made. DOI Pet. at 19a-23a.

This portion of its opinion purported to respond to the District Court's injunction against leasing of particular tracts in Lease Sale 53 "until such time as the defendants comply with the requirements of the Coastal Zone Management Act . . . by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." DOI Pet. at 19a. Only by assuming "*arguendo*" that this part of the District Court's injunction reflected an implied holding that consistency "to the maximum extent practicable" means simply conformity with a state's coastal man-

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[6]Section 307(c)(1) provides as follows: "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1).

agement program, did the Ninth Circuit reach its discussion of the meaning of that phrase. *Id.*

However, there is nothing in the District Court's opinion to this effect. The sole basis for the Ninth Circuit's assumption appears to have been the District Court's failure to include the statutory qualifier, "to the maximum extent practicable," in its injunction requiring activities on the litigated tracts to be consistent with California's program. Beyond repairing this oversight, which the Ninth Circuit did in a separate part of its opinion, there was absolutely no warrant for the Ninth Circuit's extended exegesis of the omitted phrase.[7] As that discussion was neither necessary to the Ninth Circuit's holding, nor to the relief it granted, it can only be rightly viewed as dictum.

Further, the issue in question had never been raised, briefed, or argued by any of the parties to this litigation, since the only question in the case was *whether* DOI was required to perform a consistency determination. Even had the "practicable" issue been raised, it would not have been, nor is it currently, ripe for a judicial determination since there is currently no concrete controversy over the meaning of the "practicable" clause, and such a controversy may never arise. Moreover, the case in its current posture lacks the detailed factual record that would be created were DOI and California to go through the comprehensive process

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[7]In Part IV.F. of its opinion, the Ninth Circuit corrected the District Court's failure properly to qualify its requirement of consistency with the CCMP by deleting the unqualified portion of the injunction altogether. What remains is an injunction forbidding leasing of the controverted tracts until a consistency determination is conducted. DOI Pet. at 23a-24a. This deletion is fully in keeping with the decision properly reached by the Court of Appeals — that the lease sale crosses the § 307(c)(1) threshold as an activity "directly affecting" the coastal zone — and requires no excursion into the parameters of consistency "to the maximum extent practicable."

established under the CZMA to promote the conduct of federal activities in a manner consistent to the maximum extent practicable with coastal states' federally approved management programs. For these and related reasons elaborated below, this Court should find the Ninth Circuit's discussion of the meaning of "to the maximum extent practicable" unripe and indicate that the issues discussed in Part IV.E. of its opinion should be reserved for proper resolution in a future case presenting a concrete factual dispute with a full administrative record.

A. Because There Is Not Now, and There May Never Arise, a Concrete Dispute Concerning the Meaning of "to the Maximum Extent Practicable," the Issue Is Unfit for Judicial Resolution.

A "basic rationale" of the ripeness doctrine is to prevent the courts from rendering premature decisions, "entangling themselves in abstract disagreements" about what the law would be on a hypothetical state of facts. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 51 U.S.L.W. 4449, 4451-52 (1983) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)); *see also Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). Here there is no concrete controversy over the meaning of the "maximum extent practicable" standard as applied to the terms of Lease Sale 53. Such a controversy could *conceivably* arise — if ever — only *after* the DOI performs a consistency determination, which it has not yet done. And although the threshold issue of the meaning of "directly affecting" *is* ripe, the ripeness of one provision of a comprehensive legislative enactment does not thereby automatically ripen other "portions of enactment not *immediately* involved." *Communist Party v. SACB*, 367 U.S. 1, 71 (1961) (emphasis added); *see also*

Watson v. Buck, 313 U.S. 387, 402 (1941); *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 614-15, 639-40 (1980).

The consistency determination is the first of a series of steps that NOAA has provided by regulation to help work out potential disputes between federal agencies and states concerning the consistency of federal activities with approved state coastal management programs.[8] An understanding of NOAA's regulatory scheme is essential to a proper understanding of the present lack of ripeness for adjudication of the meaning of "to the maximum extent practicable."

In brief, NOAA's regulations require a federal agency to prepare and submit a consistency determination to a coastal state at least ninety days before final approval of an activity directly affecting that state's coastal zone. 15 C.F.R. § 930.34. This determination is required to indicate whether the proposed activity will be consistent to the maximum extent practicable with the state's coastal management program and must be based upon "an evaluation of the relevant provisions" of that program. 15 C.F.R. § 930.39(a). The determination must also include "a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement." *Id.*; *see also* 15 C.F.R. § 930.39(b), (c). If the affected state disagrees with the consistency determination, it must supply the federal agency with its reasons for disagreement

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[8]NOAA is the agency within the Department of Commerce that is charged with administering the CZMA. *See* 16 U.S.C. § 1453(16); *see also American Petroleum Institute v. Knecht*, 456 F. Supp. at 894; S. Rep. No. 92-256, 92nd Cong., 2d Sess. 22 (1971); H. R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 15 (1972); H. R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 12, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822.

and supporting information; it must describe how the activity will be inconsistent and what alternative measures, if any, would allow the activity to proceed consistently, to the maximum extent practicable, with the state's management program. 15 C.F.R. §930.42(a). In cases of serious disagreement between a state and a federal agency regarding the consistency of a proposed activity, either party may call upon the Secretary of Commerce to mediate. 16 U.S.C. § 1456(h); 15 C.F.R. § 930.43. Throughout the regulations and NOAA's comments thereto, federal agencies and states are strongly encouraged to resolve their differences informally or through mediation. 15 C.F.R. §§ 930.111-.112.

Given this regulatory scheme, to which no resort has been made regarding Lease Sale 53, it is pure conjecture whether a consistency determination, once performed, would *ever* result in an actual controversy over "practicability" that would require judicial resolution. Just as the "case-by-case basis" of determinations under California's nuclear waste storage law in *Pacific Gas & Electric Co.*, 51 U.S.L.W. at 4452, meant that this Court could not know whether an actual conflict between state and federal law would ever arise, rendering a challenge to that provision unripe, so here the case-by-case determinations under § 307(c)(1) mean that we cannot know whether DOI will ever find Lease Sale 53 — or any other lease sale — inconsistent with the CCMP, and if so, whether DOI will further find consistency impracticable. Moreover, we cannot know whether California's ultimate position on Lease Sale 53 would materially diverge from DOI's on the issues of consistency and practicability, once there has been the opportunity for consultation, cooperation, compromise, and mediation provided for by Congress and NOAA.

In fact, a number of situations could occur in which no dispute over consistency to the maximum extent practicable

would arise: 1) In conducting the initial consistency determination, DOI might find Lease Sale 53 inconsistent in particular respects with the CCMP and might, *sua sponte*, amend the terms of the sale. In the words of the Court of Appeals: "In making the consistency determination, the Secretary of Interior undoubtedly will be guided by a spirit of federal/state cooperation." DOI Pet. at 23a. 2) DOI might find the sale consistent with the CCMP, and if California disagrees after receiving the DOI determination, the two parties might, in the give-and-take of the ongoing process of consultation and compromise established by the CZMA and the NOAA regulations, agree upon an amended lease sale that would satisfy both sides.[9] 3) Mediation by the Department of Commerce under § 307(h) might clear up any outstanding disagreements. 4) Finally, even if none of the above occurs, California might exercise its prerogative *not* to ligitate the issue.

Indeed, the Court of Appeals itself recognized that, absent a consistency determination, "it is not possible to know whether the Secretary of the Interior and the State of California will disagree on whether the required consistency determination reflects consistency 'to the maximum extent practicable.' " DOI Pet. at 23a. Thus, the case in its current posture presents at best only the hypothetical *possibility* of a *future* disagreement over the meaning of the "practicable"

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[9]*See* 15 C.F.R. § 930.42, comment: "In the event of a disagreement, the Federal and State agencies should utilize the remaining portion of the 90-day notice period to attempt to resolve their differences. In cases of continuing State agency disagreement, Federal agencies are encouraged to suspend implementation of the activity beyond the 90-day period pending resolution of the disagreement." 44 Fed. Reg. 37,149 (1979). *See also* 15 C.F.R. § 930.41, comment: ". . . this requirement is reiterated here to emphasize the opportunity for continued intergovernmental consultation in the event Federal and State agency concerns are not fully resolved within the 60-day period . . . of the State agency review." *Id.*

clause, and the Court of Appeals should not have reached out to discuss the meaning of that clause.

The current posture of this case is similar to that of *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, where this Court determined that the exact definition of the Occupational Safety and Health Act's "feasibility" clause should be deferred until "*after* the Secretary [of Labor] has made the threshold determination [found by the Court to be required by the Act]. . . . Unless and until such a finding is made, it is not necessary to address the further question of [the meaning of 'feasibility']." 448 U.S. at 615, 639 (emphasis added). Instead of rendering an advisory opinion on the meaning of feasibility, this Court properly deferred resolution of that important and intricate issue until it was cleanly presented by a concrete controversy.[10] *See American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981). As in *Industrial Union*, all that is necessary to the disposition is resolution of the ripe *threshold* question — in this case, whether Lease Sale 53 directly affects the coastal zone, and whether DOI must therefore prepare a consistency determination. Here, as there, it is unnecessary and inappropriate to opine on the meaning of another statutory term (there, "feasibility," here, "practicability"). To transplant the language of *Industrial Union*, "only after the Secretary has made [a consistency] determination" might the practicability issue arise.

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[10] "This Court should not express an opinion upon a question of statutory construction of much difficulty, of some doubt, and affecting numerous cases unless its determination is *necessarily* involved in the adjudication of the case at bar." *Sullivan v. Iron Silver Mining Co.*, 109 U.S. 550, 554 (1883) (emphasis added).

B. The Complete Absence of an Administrative Record and the Inadequate Factual Development Concerning the "Maximum Extent Practicable" Clause Counsel Against Current Adjudication of the Meaning of That Clause.

Even if it were assumed that an actual controversy over the meaning of the "practicable" clause will ultimately materialize and be litigated at some future date, the issue remains wholly unfit for *current* adjudication. If the question of whether Lease Sale 53 is consistent to the maximum extent practicable with the California Coastal Management Program were litigated at the end of the process provided by the NOAA regulations, the reviewing courts would then have the benefit of a full and informative factual record upon which to determine that issue.

Plainly, whether a specific federal activity is "consistent to the maximum extent practicable" with a specific state coastal management scheme is in substantial measure a question of fact dependent upon the features of the activity and the provisions of the program. Following NOAA's procedures would serve to delineate these matters sharply. The administrative record that would result from adherence to the NOAA regulations would, for instance, contain DOI's detailed description of the proposed lease sale, the facilities both onshore and offshore that would accompany it, and the effects of these on the coastal zone. DOI would also identify the specific provisions of the CCMP that it felt were relevant to its consistency determination. The state's response would pinpoint the issues in dispute by describing the ways in which it believed the activity to be inconsistent, providing factual information in support of its positions. The state would also suggest any alternatives that would allow the activity to proceed consistently with its program. If mediation occurred but proved unsuccessful, the record

produced in the process would nonetheless prove indispensable to the reviewing courts, by defining the specific points of disagreement and providing a basis for determining whether consistency "to the maximum extent practicable" had been achieved. Further, the mediation may provide the views of NOAA on the dispute. *See e.g.*, January 25, 1980 Memorandum from C. L. Haslam, General Counsel of the U.S. Department of Commerce to Secretary of Commerce on Mediation between California and the Department of Interior. Cal. Exh. L-7, C.R. 3; *reprinted in* H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 82-84 (1980).

In view of the wealth of factual information that the complete record of the consistency determination process would provide a reviewing court in determining whether a lease sale was, in fact, consistent to the "maximum extent practicable" with California's coastal program, the unwisdom of attempting to give meaning to that term in a factual vacuum is readily apparent.[11]

As this Court has recently reiterated, where "difficult issues of great public importance" are at stake — as are the questions of cooperative federalism posed by the "maximum extent practicable" clause here — it is wise to respect the prudential concerns underlying the ripeness doctrine: "[A] factual record discourag[es] the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Illinois v. Gates*, 51 U.S.L.W. 4709, 4712 (1983). Ironically, the Court of Appeals opinion itself attests to the helpfulness of a factual record by acknowledging the "imprecision" of its own "verbal formula," offered outside the context of a live

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[11]Indeed, adjudication of even purely legal issues will often benefit significantly from the development of such a record. *See, e.g., Toilet Goods Association v. Gardner*, 387 U.S. 158, 163-64 (1967).

dispute over the "maximum extent practicable" standard. DOI Brief at 22a.[12]

Nor can it be seriously argued that the current "[un]fitness of the issue[] for judicial decision" is outweighed by any conceivable "hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner, supra*, 387 U.S. at 149. Petitioners have never even *raised* the issue of practicability, much less argued that deferred adjudication would work a hardship on them.[13] Surely their failure to raise and press the issue below precludes them from now claiming serious hardship from deferred judicial review.[14]

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[12]When petitioner WOGA and other plaintiffs brought suit in 1978 requesting "a full scale declaration of the parties' rights and obligations under the CZMA and the [California Coastal Management Program]," the court properly declined the invitation "because such declarations are best left to a time when a court has before it a case or controversy sufficiently identifiable to allow a specific issue application of a specific provision or provisions of the Act or Program." *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 897 (C.D. Cal. 1978), aff'd 609 F.2d 1306 (9th Cir. 1979).

[13]Significantly, cross-respondent DOI did not even submit an opposition brief to the cross-petition for certiorari. Although cross-respondent WOGA did submit a brief in opposition, its brief is singularly devoid of any substantive argument in response to respondents' ripeness concerns. Elsewhere, petitioner WOGA has gone even further in acknowledging the unripeness of the "practicability" issue in this case. In its reply brief before the First Circuit in *Massachusetts v. Watt*, Nos. 83-0506-MA, 83-0530-MA (D. Mass., filed March 28, 1983), *appeal docketed*, No. 83-1258, and No. 83-1265 (1st Cir.), WOGA argued that:

> It is unnecessary for the Court to explore the contours of the term maximum extent practicable. While the Ninth Circuit in *California v. Watt*, 683 F.2d at 1265, did find that this term permitted a federal agency to act in a manner that was not fully consistent with a state program, plaintiffs properly point out that the Ninth Circuit was not interpreting a particular federal consistency determination (Mass. Br. 31-33, n. 1).

Reply Brief of Intervenor-Appellant at 17 n. 16.
We agree.

[14]*See, e.g., Miree v. DeKalb County*, 433 U.S. 25, 34 (1977), where this Court declined to consider, on a grant of certiorari, an issue that had been neither pleaded, argued, nor briefed in either the federal district court or the court of appeals.

Indeed, the opinion of the Court of Appeals itself made clear that no hardship would have resulted had it not engaged in its discussion of the meaning of "to the maximum extent practicable." The Ninth Circuit acknowledged that:

> The limit beyond which conformity with a state plan would not be practicable to the maximum extent cannot be precisely delineated . . . . [V]erbal formulas cannot eliminate the necessity of examining each situation with care and sensitivity to the concerns of the state and the nation.

DOI Pet. at 22a. In other words, examining the meaning of "to the maximum extent practicable" in a factual vacuum is of little assistance in resolving concrete consistency disputes that may arise in the future. Interestingly enough, the Secretary of the Interior, in discussing Part IV.E. of the Court of Appeals opinion, appears to agree: "[T]he Ninth Circuit's suggestions concerning a standard for consistency at the leasing stage are inherently vague." DOI Pet. at 19. While the federal petitioners offer this opinion to bolster their contention that no consistency determination is appropriate at the leasing stage, it plainly supports cross-petitioners' argument that the meaning of "to the maximum extent practicable" is not properly examined outside a specific factual setting.

C. Premature Adjudication Would Unjustifiably Intrude on a Comprehensive Administrative Scheme, Designed by Congress to Promote Cooperation Between Federal Agencies and Coastal States.

Premature adjudication threatens to abort a careful scheme of cooperative federalism between state and federal agencies established by Congress and NOAA. In addition to "lead[ing] to piecemeal review which . . . is inefficient and upon completion of the agency process might prove to have been

unnecessary," premature review is likely to interfere with proper administrative functioning and denies to agencies an opportunity to correct mistakes, apply expertise, and iron out disagreements in a nonadversarial setting. *FTC v. Standard Oil*, 449 U.S. 232, 242 (1980). Here, neither the California Coastal Commission, nor DOI, nor the Department of Commerce (through mediation), has had the opportunity to apply the practicability standard in the context of an actual consistency determination concerning Lease Sale 53. By denying all three agencies the opportunity to resolve informally any disagreements that might arise, premature adjudication would be triply intrusive into the elaborate administrative process established by Congress and NOAA.

In contrast to *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1977), where delayed resolution might have "frustrate[d] one of the key purposes of the [Atomic Energy] Act," one of the key purposes of the CZMA was to create a cooperative scheme that would encourage the states and federal agencies to work out their differences through a carefully crafted administrative process.[15] The Congressional declaration of policy in the CZMA's opening section is singularly clear on this point: "The Congress finds and declares that it is the national policy . . . to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying

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[15]See Regional Rail Reorganization Act Cases, 419 U.S. 102, 144 (1974) ("structure of the [underlying] Act" is highly relevant to ripeness determination).

out the purposes of this chapter." 16 U.S.C. § 1452(4);[16] *see also* S. Rep. No. 92-753, 92nd Cong., 2d Sess. 4 (1972). Thus, the Ninth Circuit should have exercised self-restraint and stayed its hand in order to allow the congressionally approved and preferred process to run its course.

D. Lacking a Ripe Controversy Over the Meaning of "to the Maximum Extent Practicable," the Ninth Circuit Erred in Its Abstract Discussion of This Phrase.

Not only is the meaning of "maximum extent practicable" bereft of the requisite concrete factual situation, but the history of this case also demonstrates a complete lack of adverseness on this issue. The issue has never been raised — much less pleaded or briefed — by petitioners and cross-respondents.[17] By the same token, cross-petitioners did not have the opportunity to brief the issue prior to the decision of the Ninth Circuit.[18] Not surprisingly, lacking the proper

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[16]Congress has made it clear that it believes that the CZMA's scheme of cooperative federalism has worked well and should not be lightly disrupted. "With the exception of the ['directly affecting' dispute] state and federal agencies have not had serious problems in administering the consistency provisions and minor difficulties which have arisen have been remedied with familiarity of the process." H. R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (1980). Case law is in accord. In *Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1058-59 (D.P.R. 1981), the court pointed out: "It is the general intent of the CZMA and the regulations that any disagreements as to the consistency of the activity will be resolved through discussions — i.e., *mutual give-and-take*." (Emphasis added.)

[17]Petitioners and cross-respondents were defendants below. Cross-petitioners and respondents were plaintiffs below.

[18]The record in this case on the "maximum extent practicable" clause is thus trebly inadequate. There are no facts concerning any actual or concrete controversy over the meaning of this clause, no administrative proceedings or administrative record, and no briefs, motions, or litigation transcripts framing the issues for the courts below. For these reasons, the trial court properly refrained from addressing this issue, and the Ninth Circuit erred in straying from the only CZMA issue presented in the case — the meaning of "directly affecting."

materials, the Ninth Circuit fundamentally misconceived the meaning of this phrase.[19] In short, the Ninth Circuit acted without the "concrete adverseness [that] sharpens the presentation of issues upon which the court so largely depends for illumination of difficult" legal questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Had the Ninth Circuit awaited the completion of the process for determining consistency established by NOAA's regulations (described *supra* at 13-14) an administrative record would have been generated, and the issue would have been ripe for review. At the very least, any dispute over the "maximum extent practicable" clause that might have arisen during the consistency determination process would have led to the application of the NOAA regulation defining that very clause, and that application would thus have become part of the administrative record for the reviewing court. *See* 15 C.F.R. § 930.32, 44 Fed. Reg. 37,146 (1979). As it was, the Ninth Circuit rendered a series of advisory observations on the meaning of the statutory phrase that failed even to take account of the NOAA standard and in effect abrogated it. Cross-petitioners' purpose in raising this point is simply to offer further evidence that the circuit court should not have included these gratuitous remarks concerning the "maximum extent practicable" standard in its opinion, and that an analysis of the meaning and effect of this standard should be reserved for a case where the issue is ripe.

The Ninth Circuit was apparently unaware that NOAA had issued a definition of "maximum extent practicable"

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[19]For a more detailed discussion of the Ninth Circuit's erroneous observations regarding the "maximum extent practicable" standard, see California's "Petition for Rehearing and Suggestion for Rehearing En Banc" filed with the Ninth Circuit on August 25, 1982.

in final regulations. NOAA's regulations specifically provide:

> (a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be *fully consistent* with such programs *unless* compliance is *prohibited* based upon the requirements of existing law applicable to the Federal agency's operations . . . .

15 C.F.R. § 930.32, 44 Fed.Reg. 37,146 (1979) (emphasis added).

The comment to this regulation explains that the term means: "to the fullest degree permitted by existing law." 44 Fed. Reg. 37,146 (1979) The regulations conclude that the effect of this section is to "require Federal agencies, *whenever legally permissible*, to consider State management programs as *supplemental requirements* to be adhered to in addition to existing agency mandates." *Id.* (emphasis added).[20] Thus, while NOAA's regulation countenances a departure from a state's management program only when "compliance is prohibited based upon the requirements of

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[20]NOAA's regulation is entitled to deference not only because of its acknowledged expertise *see, e.g.*, S. Rep. No. 92-526, 92nd Cong., 1st Sess. 15 (1971); H. R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 12, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4822; S. Rep. No. 94-277, 94th Cong., 1st Sess. 7 n. 5 (1975), but also because in amending the Act two years after NOAA's regulation was promulgated, Congress declined to alter § 307, explaining in part that "[g]enerally all consistency provisions have been *properly construed*." H. R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (1980) (emphasis added). An examination of the history of this regulation demonstrates that NOAA analyzed the meaning of "maximum extent practicable" over a two-year period, from 1976 to 1978, including careful consideration of congressional intent, and analysis of state and federal comments. The regulation defining "maximum extent practicable" was issued in final form in March 1978. 43 Fed. Reg. 10510 (1978). In 1979, the word "directly" was substituted for "significantly," but this change had no effect on the definition. 44 Fed. Reg. 37,146, 15 C.F.R. § 930.32(a) (1979).

existing law applicable to the federal agency's operations,'' 15 § C.F.R. 930.32, the Ninth Circuit broadly suggested that a state's coastal program need not take ''precedence when it would preclude the Federal activity.'' DOI Pet. at 19a. The Ninth Circuit also listed as additional factors that apparently allow DOI to avoid consistency the extent to which OCS activity ''would be hampered or proscribed'' by such consistency, and ''the reasonableness of the State plan.'' DOI Pet. at 22a.

In these respects, the Ninth Circuit's views ignore not only the NOAA regulations but also the legislative history of the CZMA. The House Report on the 1972 CZMA makes clear that the kind of ''factors'' which the Ninth Circuit would leave to DOI discretion were in fact supposed to be ''ironed out'' prior to the federal approval of the state management program:[21]

> Subsection (c) provides that once a state management program has been approved pursuant to the procedures set forth in the bill, it is expected that *each federal agency* in conducting and supporting activities in the coastal zone *will see that those activities are consistent* with the program. Under the procedures established, the Secretary is required to consult with all cognizant federal agencies *prior to approval* of a program. It is anticipated that during this process *any aspects* or phases of the proposed program which are deemed by an agency to be *impractical to carry out* or support *will be brought to the attention of the Secretary* and steps will be taken at that point to iron out whatever difficulties appear to be established.

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[21]The ''maximum extent practicable'' language was added by the House in 1972. H.R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 7 (1972). Since the Conference followed the House version of the bill, the House Report is entitled to substantial weight in construing Congressional intent.

H. R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 20 (1972) (emphasis added); *see also* H. R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 14, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822, 4824.

Thus Congress expected that if federal agencies had any difficulties with the management program, they would be worked out *prior* to approval, not *afterward*. Once the state program is approved, Congress did not intend to vest the federal agency with the broad discretion implied by the Ninth Circuit.[22]

Moreover, without the benefit of any concrete controversy to frame the Ninth Circuit's exegesis of the phrase "to the maximum extent practicable," it was led to make general pronouncements on its meaning solely in light of DOI's OCS activities and their statutory framework. However, the "maximum extent practicable" standard applies to a variety of federal activities both onshore and offshore, within and without the coastal zone. *See* § 307(c)(2), 16 U.S.C. § 1456(c)(2) (federal developments *in* the coastal zone shall be consistent "to the maximum extent practicable" with approved state management programs).[23] Thus,

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[22]The only exception which Congress contemplated was for *unforeseen circumstances* which arose after program approval:

> *There may, however, arise, after the approval of the program, some circumstances not foreseen* at the time of its approval which may present a federal agency with an obstacle or situation which as a practical matter may prevent complete adherence to the approved program. *For that reason*, the committee felt that *some leeway should be written into the statute* with respect to activities of federal agencies in connection with approved programs.

H. R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 20 (1972) (emphasis added); H. R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 14, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822, 4824.

[23]Falling within the mandates of § 307(c)(2) are such federal activities as flood control projects and harbor dredging by the Army Corps of Engineers, dock and quay construction by the Coast Guard and Navy, and stream channelization projects by the Soil Conservation Service.

the court improperly discussed this language in the CZMA, which applies to all federal agencies, by reference to another statute, the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA), 43 U.S.C. §§ 1331 *et seq.*, which applies only to DOI.[24] DOI Pet. at 20a-21a. The Court's gratuitous and uninformed discussion of the phrase in this case could have a spillover effect on many federal activities in every coastal state both onshore and offshore. Thus, by virtue of its failure to demand a factual record for its discussion, the court suggested "broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances," a practice that this court has expressly disapproved. *Illinois v. Gates*, 51 U.S.L.W. 4709, 4712 (1983).

In sum, there are a multitude of errors in the Ninth Circuit's discussion of the phrase "to the maximum extent practicable." Cross-petitioners wish to stress that these errors merely provide additional reasons the circuit court discussion should be disapproved as unripe. This is not the time to debate *how* consistency requirements should apply. The sole issue in this case is whether they *do* apply, *i.e.*, whether the "directly affecting" threshold test has been met. The question of the scope and effect of a consistency determination must await a case where such a determination has been issued.

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[24]Even here, the Ninth Circuit ignored the "savings clause" of OCSLAA — mentioned elsewhere in its opinion DOI Pet. at 18a-19a — which specifically states that OCSLAA was not intended to modify or repeal any provision of the CZMA. 43 U.S.C. § 1866. Indeed, the OCSLAA House Report makes clear that "[s]pecifically, nothing is intended to alter procedures under [the CZMA] for consistency once a state has an approved Coastal Zone Management Plan." H. R. Rep. No. 95-590, 95th Cong., 1st Sess. 153 n. 52 (1977) (discussing Section 19 of OCSLAA).

The Ninth Circuit also relied upon § 307(e) of the CZMA, which reserves federal authority over submerged lands. However, had it examined the NOAA regulation on "maximum extent practicable," it would have discovered that NOAA had specifically taken § 307(e) into account and found that this provision was not intended to affect the federal agencies' obligation under § 307(c)(1). 44 Fed. Reg. 37,146 (1979).

Conclusion.

For the foregoing reasons, cross-petitioners respectfully urge this Court to hold that the meaning of the phrase "to the maximum extent practicable" in § 307(c)(1) of the Coastal Zone Management Act, as discussed in Part IV.E. of the opinion of the Court of Appeals for the Ninth Circuit, DOI Pet. at 19a-23a, was and is unripe for determination in this case.

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